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No. 98-412

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

Warren I. Jackson,
Petitioner

v.

NCT and PFS Corp.
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF

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33 pp

QUESTIONS PRESENTED

This action under Title VII of the Civil Rights Act of 1964 alleges that employer discriminated against petitioner because of his race, black, in the terms, conditions, and privileges of employment. Respondents' motion for summary judgement was granted by the district court and affirmed by the appellate court after reviewing for reversible error.

1. There are diverging views and interpretations among the circuits with regard to what a plaintiff must show to survive a summary judgment motion. What is the appropriate showing, and did the district court make an error of law by requiring an ultimate burden of proof showing?

2. The district court, in ruling, did not establish the legal elements of a circumstantial, prima facie case of disparate treatment. Is this failure an error of law?

3. The district court, prior to rendering a decision as a matter of law, relied upon respondents' arguments. Since respondents inter alia, argued against petitioner's credibility, did the district court error?

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

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NCT and PFS Corp.
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

Petitioner files this reply brief to only correct material misrepresentations and inaccuracies contained in respondents' brief in opposition, which go to the questions presented. This brief is not intended to address respondents' obfuscated inferences, conclusions, and accounting of facts on the merits.

The questions presented in the petition for a writ of certiorari filed September 8, 1998, were drafted under Rule 10 of the Rules of the Supreme Court of the United States. It is these questions that are at issue, not those reframed by respondents. Petitioner's questions presented are appropriate because of the following.

Question I contains a request for this Court to resolve a split among the circuits regarding the appropriate review standard for a plaintiff to survive summary judgment. This Court has historically resolved such splits among the circuits.

Question II asserts that in this case, the specific legal elements for a prima facie case of disparate treatment are missing and because of their absence, the search for disputed material facts, is precluded. In other words, controlling rules of law were not properly stated. Furthermore, the absence of these prima facie elements represents a fatal departure from the normal method of analysis in a Title VII case under *McDonnell*, such that this Court may exercise its supervisory power.

Question III involves a departure so far from the course of normal judicial procedure, particularly when coupled with the departure in Question II, that this Court may exercise its supervisory power. The district court relied upon respondents' arguments *prior* to rendering a decision on summary judgment,

made an assessment of credibility, and weighed evidence.

Respondents in their brief in opposition, have mistakenly alleged that there is no split among the circuits regarding the required showing for a plaintiff to survive summary judgment. Therefore, it is necessary to review this question in more detail.

In 1997, the sixth circuit decided that a plaintiff need only to establish a prima facie case to survive summary judgment. In *EEOC v. Avery Dennison Corp.*, 104 F. 3d 858 (6th Cir. 1997) the court stated:

> "The prima facie case is not the final inquiry, but rather the first prong of analysis which defeats a motion for dismissal prior to trial. The Supreme Court so noted this in Aikens . . . In fact, a prima facie case is defined as 'sufficient evidence . . . to get plaintiff past a motion for directed verdict . . . or motion to dismiss . . . it is the evidence necessary to require defendant to proceed with his case.' It necessarily follows, then, that defendant is not entitled to judgement as a matter of law **or summary judgment if a plaintiff has proven its prima facie case.**" *Id* at 861. (Emphasis added.)

Even in the earlier case of *Ensley-Gaines v. Runyon*, 100 F. 3d 1220 (6th Cir. 1996), cited by the respondents in their brief in opposition, the court held that "plaintiff has met the burden of establishing a prima facie case of discrimination . . . and summary judgement in favor of the defendant was inappropriate." *Id* at 1227. The court did not state in this case that plaintiff must demonstrate pretext to survive summary judgment. Hence, respondents' argument as to why the court engaged in further discussion with regard to pretext, is merely speculation.

Unlike the sixth circuit, the second, seventh, and tenth circuits require that a plaintiff 1) establish the prima facie case, and 2) make a showing of pretext with regard to the legitimate non-discriminatory reasons proffered by the employer.

In *Holt v. KMI Continental, Inc.*, 95 F. 3rd 123 (2d Cir. 1996), the second circuit held

> " . . . to survive a motion for summary judgment . . . plaintiff must put forth adequate evidence to support a rational finding that the legitimate non-discriminatory reasons proffered by the employer were false, and that more likely than not . . . race was the real reason . . ." *Id* at 129.

In *Payne v. Milwaukee County Review Bd.*, 146 F. 3d 430 (7th Cir., 1998), the seventh circuit held

> "If the employer gives a legitimate non-discriminatory reason for the adverse employment action, the plaintiff must prove this reason is mere pretext for discrimination" *Id* at 433.

In *Morgan v. Hilti, Inc.*, 108 F. 3d 1319 (10th Cir. 1997), the 10th circuit held

> "On summary judgment, plaintiff's burden is only to demonstrate genuine dispute of material facts as to whether the proffered reasons were unworthy of belief" *Id* at 1321.

The third standard of review, known commonly as "pretext-plus", is used to determine if a plaintiff survives summary judgment in the first, fourth, and fifth circuits.

In *Dichner v. Liberty Travel, et al.*, 141 F. 3rd 24 (1st Cir. 1998), the first circuit held

> "To prevail under federal law, it is insufficient for a plaintiff merely to undermine the veracity of the employer's proffered justification . . ." *Id* at 30.

In *Gillins v. Berkeley Elec. Coop., Inc.*, W.L. 381092 (4th Cir. 1998), the fourth circuit held

> "To survive . . . summary judgment . . . plaintiff must do more than merely raise a jury question about the veracity of the employer's proffered justification."

In *Walton v. Bisco Industries, Inc.*, 119 F. 3rd 368 (5th Cir. 1997), the fifth circuit held

> "The plaintiff cannot succeed by proving only that the defendant's proffered reason is pretextual." *Id* at 370.

Clearly there is conflict among th circuits with regard to the appropriate showing for a Title VII plaintiff to survive summary judgement and hence, for a plaintiff to pursue his right under the law to seek affirmative relief. Among the circuits there is a prima facie only showing, a pretext showing, and a pretext-plus showing. This confusion is the result of various interpretations among the circuits of this Court's writings in *Hicks* 509 U.S. 502 (1993).

In the present case, respondents argued in their summary judgment motion a pretext-plus standard by asserting that plaintiff " has not forecast evidence to carry his ultimate burden of proving discriminatory treatment," to which the district court agreed by adoption (see petition at A41).

Now to briefly address respondents' assertion that the district court was aware of the elements of a prima facie case (see brief in opposition at page 12). Respondents' argument is totally unsupported by the record in this case. The district court never set forth in its opinions the four prong prima facie case elements, unique to this case, using the *McDonnell* model. The Court of Appeals for the Fourth Circuit failed to identify these elements as well since they reviewed only for reversible error versus de nova. These prima facie elements were never set forth in respondents' motion for summary judgment and reply brief, which the district court adopted and relied upon.

The argument by respondents as to what the district court was aware of is highly speculative. At best, one can only conclude from respondents' argument that the district court was aware of the prima facie elements in those cases that respondents cited in their summary judgment motion and reply brief.

Respondents continue their sophistry by asserting in their opposition brief at page 13 that the district court in ruling, rejected their arguments against petitioner's credibility. However, the record in this case contradicts respondents' clairvoyance: the record shows that the district court adopted respondents' arguments, and the respondents introduced credibility arguments into the record in their dismissal motion (see petition at page 16).

When the district court adopts the respondents' findings of fact and conclusion of law:

> "Those findings, though not the product of the workings of the district judge's mind, are formally his . . ." *United States v. El Paso Gas Co.*, 376 U.S. 651, 656 (1964).

In addition to the district court adopting respondents' direct assault on petitioner's credibility, the district court agreed that the psychiatric reports from other medical professionals should be given more weight than the affidavit of petitioner's treating psychiatrist, Dr. Patterson, with regard to the cause of petitioner's depression/disability (see A59-A61 and A108-A110 of petition). This is quite similar to *Payne v. Milwaukee County*, 146 F. 3d 430 (7th Cir. 1998) wherein the district court's granting of judgment as a matter of law was overturned. The appellate court in *Payne* held that:

> "When a case turns on credibility, neither side is entitled to judgment as a matter of law . . . Here it was improper for the district court to give credit to Dr. Jentzen's testimony over that of the other witnesses." *Id.* at 433.

Finally, respondents' allegation that petitioner's "functional isolation" should be precluded from consideration by this Court because this information was not presented to the courts

below, is a conscious misrepresentation of the record in this case. In his EEOC affidavit (see petition at A91-A92) petitioner states that he requested support personnel to assist him and was denied. In his deposition testimony, petitioner stated that the restriction placed upon him by management meant that he could not perform his job (see petition at A115). In his petition for rehearing submitted to the appellate court, and shown in the appendix of this reply brief beginning at page B1, petitioner even discussed his functional isolation in the format of *McDonnell* (B9-B10). To date, respondents have failed to proffer any legitimate non-discriminatory reason for this functional isolation of petitioner.

CONCLUSION

The circuits are divided with regard to the required showing for a Title VII plaintiff to survive summary judgment, and as a result, protected class members in many cases are unjustly being precluded from pursuing affirmative relief. Petitioner respectfully requests that this petition for writ of certiorari be granted such that these inconsistencies will be addressed.

Additionally, in this specific case the district court has gone far beyond the fact finding and conclusion adoption method in *El Paso*, 376 U.S. 651, by relying upon respondents' arguments *before* rendering a decision as a matter of law. Nevertheless, respondents' credibility assessment,

evidence weighing, and case analysis without the McDonnell model, now belong to the district court.

Because the record is clear that the district court has so far departed from the normal course of judicial proceedings, petitioner respectfully calls for, without any further briefing or argument, an immediate reversal of the district court's order entering summary judgment against him, or in the alternate a reconsideration or remand of the district court's orders.

Respectfully Submitted

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APPENDIX

Petition for Rehearing with Suggestion for Rehearing en Banc

97-111
UNITED STATES COURT OF APPEALS
FOR THE FOURTH DISTRICT

Case No. 97-1111

WARREN I. JACKSON	)
	)
Appellant	)
v.	)
	) **APPELLANT'S**
NCT CORPORATION	) **PETITION**
and **PFS**	) **FOR**
CORPORATION,	) **REHEARING**
a joint venture	) **WITH**
DBA "HOECHST CELANESE	) **SUGGESTION**
POLYESTER	) **FOR REHEARING**
INTERMEDIATES",	) **EN BANC**
Appellees.	)

INTRODUCTION

To the Honorable Chief, Senior, and Circuit Judges of the United States Court of Appeals for the Fourth Circuit, Appellant presents this petition for rehearing with suggestion for rehearing en banc of the above cause, and in support, respectfully shows:

1. The Appeal in this cause was submitted April 16, 1998.

2. On April 28, 1998. This Court rendered its decision in favor of Appellees and against Appellant, affirming the judgment of the United States District

Court for the Eastern District of North Carolina, Southern Division.

3. Appellant seeks a rehearing on the following grounds:

I. Material facts and law have been overlooked, and

II. The opinion of the District Court is in conflict with United States Supreme Court decisions and the conflict is not addressed in the opinion.

Specifically,

A. The District Court's opinion fails to recognize controlling law set forth by McDonnell-Douglas Corp. v. Green 411 U.S. 792, 36 L 2 Ed. 668, 93 S. Ct. 1817 (1973), which requires a presumption of discrimination when plaintiff establishes a prima facie case.

B. The District Court 's opinion also fails to recognize controlling law as sets forth by Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 67 L 2 Ed. 207, 101 S. Ct. 1089, which requires that the employer meet his burden of production to rebut the presumption of discrimination established by a prima facie showing.

BACKGROUND FACTS

Appellant filed his amended complaint under Title VII on December 12, 1995, in Unites States District Court, Eastern District of North Carolina, Southern Division, case No. 7:95-CV-175-F(3). Appellant claimed that he was subjected to different terms and conditions of employment versus similarly situated white senior process engineers. Specifically, Appellant alleged that he was assigned a significantly heavier project responsibility and was required to work without assistance, whereas similarly situated white senior process engineers had less responsibility and utilized less senior personnel in

accomplishing their objectives. Appellant alleged that this disparate treatment, coupled with numerous supervisory contacts, caused him to go into depression. Appellant further alleged that this disparate treatment was due to his race, black.

In addition to the mental and emotional distress suffered, Appellant, through deposition testimony of supervisor Miguel Chen, confirmed that he had suffered additional harm with regard to compensation, when on October 12, 1992, Miguel Chen notified Human Resources that Appellant's performance was to be rated "Requires Improvement." The requires improvement performance rating automatically resulted in Appellant being ineligible for a bonus and cost of living pay increase in the upcoming year, as testified to by supervisors Miguel Chen and Ken Stach. **See Chen Depo. at 129, 12 thru 130, 8; 131, 6 thru 132, 13 : Ex 38, Defendants' Reply Brief in Support of Motion for Summary Judgment. See also Stach Depo. at 125, 9 thru 126, 7 : Ex. B, Plaintiff's Opposition to Defendants' Motion for Summary Judgment.**

On September 5, 1996, Appellees filed their Motion for Summary Judgment shortly following the end of discovery. Appellees argued that

1) Appellant was not subjected to any adverse action and his allegations are not credible based on psychiatric reports;

2) Even if Appellant could establish a prima facie case, he could not meet his ultimate burden of proving discriminatory treatment;

3) Appellant could not make a claim of harassment since it was not included in his EEOC charge; and

4) Appellant's EEOC charge was untimely.

Appellant filed his response to Appellees' summary judgment motion on October 3, 1996. On October 30, 1996, the District Court entered its Order granting Appellees Summary Judgment. The Honorable Judge James Fox wrote:

> "The court need not repeat the facts of the case or engage in a lengthy discussion of law and its application to those facts . . . . the defendants have

> adequately and accurately exposed the numerous weaknesses in his case in their memorandum in support of the motion for summary judgment and in their reply brief. For the reasons stated there, and because the court finds in the record no evidence that plaintiff's disability was caused by unlawful discrimination or harassment on the part of the defendants, defendants' motion for summary judgment is allowed...
> "

Jackson v. NCT and PFS Corp. No. CA-95-175-F (E.D.N.C. Oct. 30, 1996)

Appellant filed a motion to reconsider on November 8, 1996 requesting that the District Court clarify the basis for its October 30,1996 Order.

The district court denied Appellant's motion to reconsider on December 17, 1996.

ARGUMENT

The District Court's October 30, 1996 opinion is too vague to ensure that the court has applied the appropriate legal test. The opinion is not framed in the language of McDonnell-Douglas Corp., v. Green, 411 U.S. 792, 36 2. Ed. 2d. 668, 93 S. Ct. 1817 (1973), nor

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 67 L. Ed. 2d. 207, 101 S. Ct. 1089. The criteria for establishing the prima facie case and burden of proof set forth by these two cases are controlling in this Title VII cause.

Since there is no mention of these cases in the District Court's October 30, 1996 and December 17, 1996 opinions, and the only criteria set forth as controlling is that of Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255 (1986) and Smith v. Virginia Commonwealth University, 84 F. 3d. 672, 675 (4th Cir. 1996) (en banc), one can only conclude that the familiar McDonnell-Douglas and Burdine criteria were not applied.

Establishment of the prima facie case carries with it a presumption of discriminatory intent per McDonnell-Douglas and Burdine. Analogous to McDonnell-Douglas, Appellant in this cause must establish a prima facie case by showing that 1) he is a member of a protected class, 2) he was qualified for his position and his performance was satisfactory, 3) despite

his qualifications and satisfactory performance, he suffered harm due to an adverse employment decision by his employer, and 4) similarly situated employees outside of the protected class were treated less harshly.

With the establishment of the prima facie case by the employee, the burden of production shifts to the employer to articulate legitimate non-discriminatory business reasons to rebut the presumption of discrimination which comes with the establishment of the prima facie case. However, the employer's rebuttal evidence must be legally admissible at trial, and cannot be an answer to complaint nor argument by counsel, as set forth by Burdine. In addition, Burdine requires that the articulated non-discriminatory business reasons be "clear and reasonably specific."

Once the employer has disposed of his burden of production, only then does the burden shift back to the employee to demonstrate pretext. Burdine sets forth clearly and precisely how this is to be done: 1) directly, by plaintiff persuading the court that a discriminatory reason more likely motivated the employer, or 2)

indirectly, by showing that the employer's proffered reasons are unworthy of credence. Plaintiff must be afforded "a full and fair opportunity" to demonstrate pretext.

The above criteria set forth by McDonnell-Douglas and Burdine, must merge with the standard for review of summary judgment, in evaluating Appellees' motion for summary judgment in this Title VII cause.

I. The record clearly shows that Appellant has meet the requirements for establishing a prima facie case in this cause as set forth by McDonnell-Douglas.

1. It is undisputed that Appellant is a member of a protected class.

2. It is undisputed that Appellant was qualified for his position. It is also undisputed that Appellant's performance was satisfactory at mid-year 1992 and up to October 2, 1992, based on the testimony of supervisor Ken Stach. **(See plaintiff's opposition to**

defendants' motion for summary judgment, Ex. B. Stach Depo: 101, 13 thru 102, 2)

3. The record is clear that in June, 1992 different terms and conditions of employment were imposed upon Appellant during his mid year review. Appellant testified during deposition that supervisor Miguel Chen set a requirement that Appellant was to do all of his work without assistance, and Appellant project workload totalled $9.2 million. These terms and conditions would make it impossible for Appellant to get a satisfactory 1992 performance rating. Appellant alleged that he became depressed as a result of being under these working conditions. The record is clear that Appellant's mental and emotional distress was due to his working environment.

4. The record shows that the other three similarly situated white senior process engineers, with significantly smaller project work loads, used less senior personnel to assist them, and were in fact commended for directing these individuals.

See Jackson Depo. at 76, 23 thru 78, 23. See also Ex. A: Jackson affidavit, Ex. E: Dr. Patterson affidavit, and Chen Depo, at 25, 3-22; 27, 2-3; contained in plaintiff's opposition to defendants' motion for summary judgment.

Appellant's allegations must be assumed true in evaluating the motion for summary judgment. Appellant has shown all elements of the prima facie case which under McDonald-Douglas, carries the presumption of discriminatory intent, and shifts the burden of production to the Appellees.

2. Appellees have failed to dispose of their burden of production, by failing to articulate clearly and specifically their non-discriminatory reasons for the disparate work load and requiring that Appellant work without assistance. Therefore the presumption of discrimination remains in tact, and Appellees are not entitled to summary judgment.

Appellees have not clearly and specifically proffered any legitimate reason to explain the disparate treatment of Appellant. Instead, they challenge through arguments of counsel, the cause of Appellant's disability. However, the presumption of discrimination still remains; the Civil Rights Act of 1991 recognizes the mental and emotional distress caused by discrimination and allows for recovery.

Even if Appellees' challenge as to the cause of Appellant's disability is interpreted as a response for the purpose of disposing of their burden of production, their challenge must fail under Burdine.

Burdine sets forth that the evidence presented in rebuttal of the prima facie case cannot be a response to complaint, or an argument of counsel, and the evidence must be admissible at trial. Appellees' challenge comes through argument of counsel. In addition, the psychiatric reports Appellees' use 1) are irrelevant since they do not state that Appellant's condition *was not* caused by the Appellees, and are based on evaluations of Appellant that took place three years after he first became disabled and

left work; 2) have not been authenticated; and 3) are therefore not admissible at trial. Hence, Appellees fail to dispose of their burden of production.

3. Appellees' Denial of Appellant's Bonus and Pay Increase was Discriminatory.

To establish the prima facie case, Appellant must show that 1) he is a protected class member, 2) his performance was satisfactory, 3) he was denied a bonus and pay increase, and 4) other employees outside the protected class and similarly situated were not denied their bonus or raise. The state of the record shows that the above criteria has been satisfied.

1) Again, protected class is undisputed.

2) *Appellees'* contend that *Appellant's performance was satisfactory*, since he

never received his 1992 year end performance review. To this point, Appellant will concede. **See Defendants' Reply Brief for Summary Judgment, page 4.**

3) It is undisputed that Appellant was denied a bonus and pay increase.

4) From the testimony of Ken Stach, other similarly situated employees were not on a requires improvement (RI) plan, and Appellant was the only senior engineer that Stach had ever put on a RI plan. Therefore, the record infers that similarly situated employees were not denied their bonus and pay increase. **See Ex B: Stach Depo. at 102, 14-24; 125, 9 thru 126, 7 in Plaintiff's Opposition to Defendants' Motion for Summary Judgment.**

4. Appellees' proffered non-discriminatory reasons for denying Appellant a pay increase and bonus are demonstrated by the record to be false.

Appellees have articulated that the reason Appellant did not received a pay increase was because he was not at work at the time raises were given. However, cross examination of human resource manager Roy Neal reveals that the articulated reason is false. The record as stands shows that even if Appellant had been at work, he would not have gotten a pay increase **See Ex. B: Neal**

Depo. at 78, 18 thru 82, 21 ; Plaintiff's Opposition to Defendants' Motion For Summary Judgment. Per the criteria set forth by Burdine, demonstrating that a proffered non-discriminatory reason is unworthy of credence is sufficient to refute employers' rebuttal of the prima facie case; the presumption of discrimination remains, and so Appellees are not entitled to summary judgment.

Appellees' proffered reason for denying Appellant a bonus is that his performance was rated requires improvement. Appellant has already shown per the record that this proffered reason is false (**See Defendants' Reply Brief for Summary Judgment , page 4**). Consequently, the prima facie case along with its binding presumption of discrimination remains in tact, and Appellees are not entitled to summary judgment.

SUMMARY

Appellant respectfully request that his petition for rehearing with suggestion for rehearing en banc be granted, because the opinion rendered by the District

Court appears to be in conflict with controlling law as set forth by McDonnell-Douglas and Burdine. Although it may have been more appropriate for Appellant to forego the suggestion and to base his petition solely on material facts and law being overlooked , Appellant was precluded from doing so since the District Court failed to discuss controlling law with regard to the facts in this case, thus leaving Appellant to speculate as to what was overlooked.

This suggest however, a much larger issue than those immediately contained in Appellant's cause: **should the absence of a requirement under Fed. R. Civ. P. 52(a) that a court set forth in its opinion findings of fact and conclusions of law, preclude the Burdine requirement that a plaintiff be afforded "full and fair opportunity" to refute an employer's articulated non-discriminatory reasons.**

Nevertheless, Appellant believes that he has set forth sufficient reasons to justify a reversal of the District Court's decision to grant Appellees summary judgment. THEREFORE, for the reasons set forth by this petition,

Appellant prays for a reversal of the District Court and remand for trial.

This the 10th day of May, 1998.

Respectfully Submitted,

/s/ Warren I. Jackson

Warren I. Jackson, pro se -
Appellant